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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
and
KEARNEY & TRECKER CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Wisconsin

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LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Wisconsin

The petitioners Lodge 76, International Association of Machinists and Aerospace Workers and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin entered in this case on March 4, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 67 Wis. 2d 13, 226 N.W. 2d 203, and reprinted in Appendix B annexed hereto (*infra*, p. A-2ff). The opinion of the Circuit Court for Milwaukee County and the decision of the Wisconsin Employment Relations Commission are unreported but appear as Appendix C and Appendix D here (*infra*, p. A-15ff and p. A-22ff).

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on March 4, 1975. A timely petition for rehearing was denied on May 6, 1975 (Appendix A; *infra*, p. A-1), and this petition for certiorari was filed within 90 days thereafter.[1] The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Does a state offend Article VI of the Constitution of the United States by applying local standards as to allowable collective bargaining weapons to outlaw peaceful, concerted refusals to work voluntary overtime for an employer in interstate commerce, a self-help activity permitted as part of the balance of power between labor and management as expressed in our national labor policy?

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[1] The petition is timely. Cf. *Department of Banking v. Pink*, 317 US 264, 266 (1942); *United States v. Healy*, 376 US 75, 78 (1964).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution of the United States, of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. § 141, *et seq.*) and of the Wisconsin Statutes (§ 111.06(2)(h)) are set out in Appendix E (*infra*, p. A-52ff).

STATEMENT OF THE CASE

Kearney & Trecker Corporation ("K & T" or "employer") is a Milwaukee area manufacturer of machine tools, engaged in interstate commerce and within the jurisdictional standards of the National Labor Relations Board. Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO ("Lodge 76" or "Union") represents, with certain exceptions, all of K & T's hourly employees for purposes of collective bargaining and was party to a labor agreement with the Employer that, as terminable on and after February 28, 1971, was terminated on June 19, 1971. Under that agreement, and for the past 17 years, the basic work day for K & T's hourly employees was seven and one-half hours, Monday through Friday, for a basic work week of 37 and one-half hours. Hours worked in excess of the basic work day or basic work week were compensated at overtime rates. Acceptance of overtime work has always been voluntary, with the employee free to decline it.[2]

Negotiations for a successor labor agreement commenced in October, 1970, and were not concluded until July 23, 1972, when the new contract took effect. In bargaining the

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[2] App., pp. A-32, A-49. See, also, Appellant's Appendix in the Supreme Court of Wisconsin ("A. App."), pp. 154, 158.

Employer demanded that the basic work day and basic work week for hourly employees be lengthened to eight hours per day, Monday through Friday, and 40 hours per week, and that the terms on which overtime was payable be restricted accordingly. Lodge 76 refused to agree to this demand and, by June 22, 1971, the parties had reached impasse on this and certain other proposals. At that time, K & T unilaterally implemented certain changes in the conditions prescribed by the expired contract, including elimination of the check-off of Union dues, of the Union's office in the plant, and of Union lost-time.[3]

On March 1 and 3, 1972, although the parties were still at impasse on the matter, the Employer announced its decision to implement unilaterally, as of March 13, its work day, work week and overtime pay proposal. On March 7, in response thereto, the membership of Lodge 76 authorized its officers to request strike sanctions and unanimously enacted resolutions prohibiting any members from working any overtime.[4] On March 10 and 11, K & T made two proposals, the effect of which was temporarily to defer implementation of its proposed changes in work day, work week and overtime pay if the Union would agree that its membership could be forced to accept overtime work, or a prescribed amount thereof, each day. Lodge 76 rejected these proposals and its officials refused to ask the membership to rescind the resolution of March 7.

From March 7, 1972, until agreement on the new contract was reached, almost all members of the Union refused to accept daily or Saturday overtime work but otherwise con-

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[3] App., p. A-41; A. App., p. 157.

[4] Overtime was defined as work in excess of seven and one-half hours a day or 37 and one-half hours a week. App., pp. A-3, A-31, A-50.

tinued to perform their normal duties. Consequently, despite its earlier announcement to the contrary, K & T chose to postpone (but did not renounce) implementation of the proposed changes in work day, work week and overtime pay. Because acceptance of overtime work has always been voluntary, K & T did not impose any discipline on Lodge 76 members for refusing to work overtime after March 7, 1972.[5]

Instead, the Employer sought to end the concerted activity through legal action. On June 27, 1972, K & T's charge filed with the National Labor Relations Board that the Union's overtime ban violated § 8(b)(3) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(b)(3), was dismissed by the Regional Director on the ground that such conduct was not prohibited by the Act.[6] However, its complaint that the conduct constituted an unfair labor practice under state law, § 111.06(2)(h), Wis. Stats., was sustained by the Wisconsin Employment Relations Commission ("Commission") and, ultimately, by the Supreme Court of Wisconsin.

From the outset and at all subsequent stages of the litigation, petitioners raised in timely and proper fashion the federal question presented here. By motion to dismiss and then by affirmative defense in answer to the complaint, petitioners challenged state jurisdiction over the activity complained of as in conflict with the Act and therefore with the Constitution of the United States.[7] By express assignments of error in the petitions for Commission review of the Examiner's decision,[8] for review of the Commission's order by the Circuit Court

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[5] A. App., p. 158.

[6] Citing *NLRB v. Insurance Agents' International Union AFL-CIO*, 361 US 477 (1960).

[7] Summarized and discussed by the Examiner at App., p. A-38ff.

[8] Summarized and discussed by the Commission at App., p. A-23.

for Milwaukee County,[9] and in the appeal to the Supreme Court of Wisconsin,[10] petitioners renewed their preemption contentions.

The Commission concluded that state jurisdiction existed because the concerted activity was "not an activity which is arguably protected under Section 7 or arguably prohibited under Section 8" of the Act[11] and was therefore subject to restraint under state law on the authority of this Court's decision in *Briggs-Stratton*.[12] The circuit court enforced the order, reasoning that the *Briggs-Stratton* holding with respect to "the kind of activity" here "has never been overruled" and that this Court would have to provide a "more definitive basis" than heretofore "[b]efore a provision of the Wisconsin Peace Act is declared a nullity."[13]

On appeal the Supreme Court of Wisconsin affirmed the judgment. Its opinion sustained state jurisdiction upon determinations that the Union's conduct was neither arguably protected nor arguably prohibited by the Act and that state prohibition of the activity was not "contrary to any legislative

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[9] This was the sole issue raised on review, App., p. A-16.

[10] This was the only question raised on appeal. App., p. A-5.

[11] App., p. A-33.

[12] *International Union, UAW v. Wisconsin Employment Relations Board*, 336 US 245 (1949). App., p. A-46. The Commission concurred in the rationale that the "result" in *Briggs-Stratton* has survived this Court's repeated repudiation of its "approach". It reached this conclusion reluctantly. The Commission found "persuasive" the argument that this "allow[ed] the states too great leeway to regulate the use of economic weapons by the parties thereby disturbing the relative balance of power established by the federal scheme" but felt compelled to reject the argument based on the test formulated by this Court in *San Diego Building Trades Council v. Garmon*, 359 US 236 (1959). App., p. A-48.

[13] App. pp. A-20, A-19.

purpose" of the federal statute.[14] *Briggs-Stratton*, the court reasoned, was "authority" for the principle that Congress yielded plenary jurisdiction to the states to regulate what were termed "strike tactics."[15] This Court's *Morton*[16] decision that a state may not bar self-help weapons merely permitted but not "arguably protected" by § 7 of the federal statute was thought distinguishable because secondary pressures rather than "partial strikes" were involved. Regulation of partial strikes, the court below holds, is "left wholly to the states."[17]

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[14] App., p. A-14.

[15] App., p. A-10.

[16] *Local 20, Teamsters Union v. Morton*, 377 US 252 (1964).

[17] App., p. A-14.

REASONS FOR GRANTING THE WRIT

I. The Court Below Has Decided a Substantial and Important Federal Question Contrary to Applicable Decisions of the Court.

A. The Federal Question.

Because the Supreme Court of Wisconsin has sustained the validity of a state statute as against a claim of repugnance to Article VI, cl. 2 of the federal Constitution, the judgment below presents a question of federal law which may be reviewed by this Court upon writ of certiorari,[18] 28 U.S.C. § 1257(3). This Court gives "significant weight to the vital importance of preventing state injunctions from frustrating federal labor policy" such that interlocutory restraints in labor disputes are deemed "final" judgments and even normally adequate state grounds such as mootness present federal questions for purposes of review.[19] The federal question here, pressed from the beginning by petitioners, is of course determinative of the validity of the judgment below. If the preemption claim is correct, the "federal statute and policy oust state courts of any power whatever to deal with the conduct in question" and the judgment must be vacated.[20]

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[18] "The National Labor Relations Act of 1935 and the Labor Management Relations Act of 1947, passed by Congress pursuant to its powers under the Commerce Clause, are the supreme law of the land under Art. 6 of the Constitution. Having found that the Wisconsin * * * Law conflicts with that federal legislation, the judgments enforcing the Wisconsin Act cannot stand." *Amalgamated Assoc. of Street, etc. Employees v. Wisconsin Employment Relations Board*, 340 US 383, 399 (1951).

[19] *Liner v. Jafco*, 375 US 301, 304, 307-310 (1964); *Construction Laborers' Union v. Curry*, 371 US 542, 552 (1963).

[20] *Liner v. Jafco, supra*, 375 US at 309.

The question comes down to whether Congress, when it rejected specific proposals to outlaw the kind of peaceful economic weapon used here and limited the National Labor Relations Board from influencing the substantive terms upon which the parties contract by forbidding it, nevertheless left the state free to do so. Petitioners suggest that the decision below, in its broad arrogation to the states of exclusive power to forbid peaceful "strike tactics", and "partial strikes" in particular, threatens to obstruct the uniform application of national labor policy in the crucial area of the free play of federally permissible economic forces.

B. The Conflict.

The holding below that states have plenary power to police federally permissible peaceful partial strike activity conflicts directly with this Court's decision in *Morton*[21] and is contrary to the teachings of this Court in *Garner*[22] and *Insurance Agents*.[23]

Morton stands squarely for the principle that a state cannot outlaw a peaceful weapon of self-help which is permitted but not arguably protected by the federal statute.[24] There, the union

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[21] *Local 20, Teamsters Union v. Morton*, 377 US 252 (1964).

[22] *Garner v. Teamsters, etc. Local No. 776*, 346 US 485, 500 (1953).

[23] *National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO*, 361 US 477 (1960).

[24] Professor Lesnick, as part of his thesis that the "time has long since come to eschew entirely the traditional 'primary jurisdiction' rationale implicit in the 'protected or prohibited' aphorism" in favor of a "negative inference" rationale consistent with petitioners' position here, observes: "[T]he notion that there is no preemption if unprotected conduct is also not prohibited is simply not the law. * * * *Morton* is squarely dispositive of the point. . . ." Lesnick, "Pre-

struck a trucking firm and, in a non-coercive manner, persuaded a customer to refrain from using the services of the struck firm, activity allowed by the federal statute but for which the lower court had awarded damages under state law. This Court, assuming the conduct to be neither arguably protected nor prohibited, 377 US at 258, nevertheless barred application of state law:

> "This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. Electrical Workers Local 761 v. Labor Board, 366 US 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [§ 8(b)(4) of the Act], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." 377 US at 259-260

The *Morton* holding extends to self-help weapons generally this Court's postulate in *Garner* that the Act is a comprehensive code that outlaws some peaceful weapons in labor combat but permits others not specifically prohibited and implicitly bars their restraint under state law.[25]

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emption Reconsidered: The Apparent Reaffirmation of Garmon", 72 *Col. L. Rev.* 469, 472, 474 (1972). See, also, Ratner, "Damage Actions and the Impact of the Morton Case", *18th Ann. NYU Conf. on Labor*, 117, 122 (1966): "*Morton* is significant also in that it finally lays to rest the notion that conduct which the . . . Act neither prohibits nor protects is necessarily outside the occupied field and therefore subject to state law."

[25] "The detailed description of a procedure for restraint of specified types of picketing would seem to imply that other picketing is

The court below thought the *Garner-Morton* theory of countervailing economic power inapposite because Congress has not "taken in hand" or "focused upon" partial strike activity.[26] But the plain and necessary implications of *Insurance Agents* foreclose any such restriction. There the Labor Board claimed that refusals to work normal hours and other concerted on-the-job activities in aid of the union's position in negotiations violated § 8(b)(3) of the Act because such tactics obstructed the proper operation of the collective bargaining process by affording employees unfair economic advantage. This Court agreed, "arguendo", that the partial strike activities were not "protected" by § 7 of the Act, 361 US at 492, but reversing the Board on the point, held them permitted by the statute.

The premises underlying *Insurance Agents* necessarily oust state power. This Court reasoned that the availability of economic pressure devices is part and parcel of the process of collective bargaining established by the federal statute, and in-

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to be free of other methods and sources of restraint. For the policy of the [NLRA] is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." 346 US at 499-500.

[26] *Morton* may have been an "easy case" because it involved secondary pressures, but, as Professor Cox states, its "underlying principle . . . is one of broad application" reaching *any* state-imposed "restrictions upon labor's use of economic weapons going beyond NLRA section 8(b) in terms of prohibited objects or forms of economic pressure." That underlying principle, according to Professor Cox, "explains more than the *Morton* case. It also supplies the ultimate foundation for the rule that state laws may not be used to restrict activities protected by Section 7." He propounds the principle as follows: "Congress struck a balance of protection, prohibition and laissez faire in respect to union organization, collective bargaining and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its own views concerning accommodation of the same interests." Cox, "Labor Law Preemption Revisited", 85 *Harv. L. Rev.* 1337, 1352, 1354 (1972).

deed, the very content of the bargain is likely to depend upon the sort of economic weapons the parties can use to gain acceptance of their bargaining demands. 361 US at 489. The federal agency lacked authority to "act at large in equalizing disparities of bargaining power" in the name of "some new distinction of justifiable and unjustifiable, proper and abusive economic weapons" or "to add to the Act's [specific] prohibitions here"[27] because "this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced." 361 US at 498.

It follows, *a fortiori*, that *state* courts and agencies must refrain from imposing their own standards as well.[28] For local prohibition of federally permissible economic weapons in collective bargaining presents:

> "the greatest threat against which the Garmon doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered."[29]

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[27] 361 US at 490, 495, 497, 498. More recently, this Court has again chided the Board for attempting to regulate "the choice of economic weapons that may be used as part of collective bargaining absent a particularized statutory mandate", specifically indicating that the Act "neither protects nor prohibits" the weapon there, i.e. the fining of supervisor members for performing struck work. *Florida Power & Light Co. v. Int. Bro. of Electrical Workers*, 417 US 790, 41 L.ed. 2d 477, 488, n. 16 (1974). Absent review, the decision below would permit Wisconsin to disturb the free play of economic forces with respect to this weapon as well.

[28] "[I]t is strongly felt that concerted activity which serves to interfere with the employer's operations, without removing the participants from the employer's payroll is 'indefensible' . . . [H]owever, it seems a sufficient response that the employer is left free, as a matter of federal law, to discharge the culprits. No state intervention would appear to be called for. * * * From [*Insurance Agents*] it would seem to follow a fortiori that state courts and agencies may not interject their standards of 'unjustifiable' or 'abusive' economic weapons into the context of a collective bargaining dispute." Michelman, "State Power to Govern Concerted Employee Activities", 74 *Harv. L. Rev.* 641, 668-669 (1961).

[29] *Hanna Mining Company v. District 2, Marine Engineers Ben. Assn., AFL-CIO*, 382 US 181, 193 (1965).

State policing of peaceful concerted activity is repugnant to a fundamental postulate of federal labor policy:

> "The perceived incapacity of . . . state legislatures, acting alone, to provide an informed and coherent basis . . . for equitably and delicately structuring the balance of power among competing forces so as to further the common good."[30]

State labor laws, like state anti-trust laws, may either fail to take account of federal labor goals, or, if they do, may represent a totally different balance than does federal labor policy.[31] Here, *Insurance Agents* precisely delineates the federal balance with respect to "unprotected" partial strike activity:

> "There is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they are willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful . . ."
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> 361 US at 495.

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[30] *Amalgamated Assn. of Street, etc. Employees v. Lockridge*, 403 US 274, 286 (1971).

[31] *Connell Constr. Co. v. Plumbers Local 100*, — US —, 44 L.ed. 2d 418, 433-434 (1975). For example, § 111.06(2) (h) Wis. Stats. broadly prohibits any concerted interference with "production" except "leaving the premises in an orderly manner for the purpose of going on strike" because such conduct is deemed too "coercive" of employer interests. *Briggs-Stratton*, 336 US at 264-265. The federal statute is not so solicitous, actually protecting from employer reprisal much peaceful activity within the reach of the state statute (*infra*, p. 16) and leaving the rest to employer self-help, if he is willing to face the economic consequences of its use. Moreover, though today Wisconsin merely makes partial strike activity an unfair labor practice subject to restraint by the Commission or injunctive relief at its behest in state court (§ 111.07(4), Wis. Stats.), the decision below, if permitted to stand, would allow Alabama, or Wisconsin for that matter at some later date, to impose criminal penalties or to permit damage recoveries for such activities. Under *Lockridge*, however, the federal enforcement and remedial scheme, is as integral to federal labor policy as is the substantive law. 403 US at 287-288 and at 289, n. 5 (specifically condemning "disparities in the reactions of the states to unlawful union behavior").

One such "economic consequence" of employer self-help, by way of discipline at least,[32] could be the *protected* right of co-workers to strike for reinstatement of those disciplined.[33] Thus *Insurance Agents* teaches that the holding below disturbs the delicate balance struck by Congress by impinging on an area Congress left "to be controlled by the free play of economic forces."[34]

The claim below that conflict with *Garner* and *Morton* is averted because Congress did not "take in hand" or "focus upon" particular strike activity is untenable for another reason as well. In 1947, Congress did indeed "focus upon," and reject, a proposal to have the federal statute outlaw "concerted interference with an employer's operations conducted by remaining on the employer's premises" as an "unlawful concerted activity,"[35] a

[32] Another "self-help" response presumably available to K & T was to lock out until the impasse was resolved. If Wisconsin were to proscribe any employer self-help measure short of the lockout, as the reasoning below suggests it may do, then this Court would surely find the enactment to impinge on the area of labor combat designed to be free. *Pari passu*, the Union's conduct here must be privileged from state restraint.

[33] *John S. Swift Company, Inc.*, 124 NLRB 394, *enf'd on this point*, 277 F.2d 641 (7th Cir. 1960). In *Swift*, the employer discharged a number of employees who, in support of certain bargaining demands, had concertedly refused to work a mandatory assignment of overtime hours. Other employees then observed the picket lines established by the discharged workers and were, in turn, discharged. The Board held, and the Court of Appeals agreed, that the latter discharges were unlawful. "[E]mployees who go on strike to protest a lawful discharge enjoy statutory protection as economic strikers." 277 F.2d at 646.

[34] *NLRB v. Nash-Finch Co.*, 404 US 138, 144 (1971): "The federal regulatory scheme (1) protects some activities, though not violence [citation omitted]; (2) prohibits some practices, and (3) leaves others to be controlled by the free play of economic forces." This recent formulation of the applicable test suggests no room at all for state policing of peaceful strike tactics.

[35] H.R. 3020, 80th Cong., 1st Sess., § 12 reprinted at *1 Legislative History of the LMRA of 1947*, p. 205. Cf. *Insurance Agents*, 361 US at 499, n. 31.

proposal remarkably similar to the state statute applied here. The provision was dropped in the Conference Committee, *inter alia*, because employees who engage in such conduct "do not have any immunity under the act and are subject to discharge without right of reinstatement."[36] Thus, the legislative history itself demonstrates the fact of Congressional "focus" and unmistakeably suggests that the federal statute left such conduct as partial strikes to be controlled by the free play of economic forces.

C. The Importance of Reviewing the Conflict.

If the states are indeed "free to regulate [peaceful] strike tactics" and Congress left the "policing" of partial strikes "wholly to the states", as the court below so broadly holds, then each of the fifty state governments becomes, in substantial measure, the arbiter of allowable economic pressure within its boundaries and uniformity in crucial sectors of national labor policy is emasculated. If the decision below stands as law, Michigan's legislature, or its courts, for that matter, are free to outlaw concerted refusals by auto workers to work overtime when their employer attempts to "stock pile" production to prepare for a possible strike.[37] Alabama, Indiana, or Pennsylvania may do likewise for the steel industry, and so on. If the decision stands, a state may proscribe responsive worker pressures on the basis of parochial "evaluation of the very same range of interests that had to be considered in formulating national labor policy", a basis that this Court, early on, recognized as apt to threaten important federal concerns.[38]

[36] *1 Legislative History of the LMRA*, *supra*, p. 563.

[37] Auto workers in Wisconsin, of course, are vitally interested in the matter. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, appeared *amicus* in the Supreme Court of Wisconsin. App., p. A-5.

[38] See *Lockridge*, *supra*, 403 US at 290. "When a state is attempting to solve general problems, the danger of distributing various

Equally important, the arrogation of plenary authority to the states to "police" what the court below chose to term "partial strikes" portends local restraint of federally protected employee rights to engage in concerted activities for mutual aid and protection. Section 7 of the Act protects many forms of concerted on-the-job conduct including refusals to work overtime, all of which, at least literally, are partial strikes.[39] The court below ruled this federal precedent distinguishable, drawing a nice distinction between rejections of "scheduled or requested" voluntary overtime and refusals to "volunteer" for it and indicating that § 7 protects overtime bans by unorganized workers but not when they are union-induced in support of collective bargaining goals. That effort is not only misconceived,[40]

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interests in union organization and collective bargaining is much less serious than when it is formulating statutes or common law doctrines based upon evaluation of the very same range of interests that had to be considered in formulating national labor policy." Cox, "Federalism in the Law of Labor Relations," 67 *Harv. L. Rev.* 1297, 1321 (1954).

[39] Refusals to work voluntary overtime: *Dow Chemical Co.*, 152 NLRB 1150. Concerted rejection by production workers of optional though requested or scheduled truckdriving assignments: *Memphis Moldings, Inc.*, 164 NLRB 524. Non-unit workers' refusal to perform struck work: *Cooper Thermometer Co.*, 154 NLRB 502; *General Tire & Rubber Co.*, 190 NLRB No. 44, enf'd, 451 F.2d 257 (1st Cir. 1971). Refusal to cross picket lines at customer premises: *Redwing Carriers, Inc.*, 137 NLRB 1545, *enf'd*, 325 F.2d 1011 (DC Cir. 1963); *Overnight Transportation Co.*, 154 NLRB 1271, *enf'd*, 364 F.2d 682 (DC Cir. 1965); *Swain and Morris Constr. Co.*, 168 NLRB 1064.

[40] The Labor Board's rationale in *Dow Chemical* came down to the fact that, since overtime work was optional, "the employer had already agreed to permit employees to decide for themselves whether they wished to work weekends * * * [and thus in concertedly rejecting the work the employees did not seek] to impose on their employer their own conditions of employment." 152 NLRB at 1152. Notwithstanding the Board's evident differentiation between insubordination and group exercise of a right to reject, the court below built a fortress on the procedural fortuity that *Dow* employees had refused to "volunteer" as opposed to exercising a right to decline requests to work the overtime. Further, the court's notion that otherwise protected concerted activity forfeits protection when union-induced is nothing less than the long discredited conspiracy doctrine. Since enactment of § 7 "[N]o longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy because they are undertaken by many persons acting in concert." *Briggs-Stratton*, 336 US at 258. Finally, the court below patently misread the Board's *Prince Lithograph* decision as authority for the proposition that union-induced concerted refusals to work voluntary, requested overtime are unprotected. The Board dismissed the complaint because Prince had exercised the normal privilege afforded any employer faced with *protected* full or partial strike activities, *i.e.*, to attempt to continue operating his business with replacements. *Prince Lithograph*, 205 NLRB No. 23 (Slip. op., p. 1, n. 2).

it also illustrates the magnitude of the threat to the exercise of protected rights when the wrong tribunals are free to make those determinations singlehandedly. This Court holds that, under federal labor policy, such "precise and closely limited demarcations" must be left to the Labor Board, the centralized agency "armed with its own procedures and equipped with its specialized knowledge and cumulative experience."[41] Thus the decision below rejects not only the legislative judgment in favor of uniformity of labor policy but the Congressional decision to confide primary interpretation and application of its rules to a centralized, expert tribunal. Of course, since the federal policies of substance and administration are intertwined, the decision below to breach the one inextricably led to breach of the other and makes review by this Court all the more important.

Finally, by materializing the *Briggs-Stratton* spectre that peaceful economic weapons may come within some excluded middle of federal labor policy neither arguably protected by §7 nor arguably prohibited by § 8 of the Act and thus be subject to state prohibition, the decision below makes it essential for this Court to reiterate, if not further articulate, the considerations to govern state tribunals confronted with challenges under local law to federally permissible economic pressure de-

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[41] *Garmon, supra*, 359 US at 242.

vices. For it is apparent that the question of state power cannot always turn on whether Congress arguably "protected" them under § 7.[42] Peaceful picketing to protest employment practices by persons other than employees of the picketed firm exemplifies recurring union conduct unprotected by § 7 and thus restrainable by the states under the rule of the decision below.[43] And, of course, no federally permitted *employer* self-help weapon, from post-impasse unilateral changes to the lock-out, is protected by § 7, even arguably. *Lockridge* teaches that state tribunals must be given a "rule capable of relatively easy application" so that they can "largely police themselves" in dealing with these crucial concerns. 403 US at 290. The decision below demonstrates the compelling need for further guidance from this Court since tribunals cannot "largely police themselves" and avoid encroachment upon federal labor policy with only concepts as indeterminate and subtle as Congressional "focus" to guide them through this unfamiliar territory.

II. Special and Important Reasons, Appropriately Presented in This Case, Warrant the Reconsideration and Overruling of Any Surviving Remnant of the Decision of This Court in Briggs-Stratton.

Considerations of sound judicial administration of federal labor policy warrant the review and reversal by this Court of any

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[42] Mr. Justice Harlan exposed the nerve of the difficulty in *Bro. of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 US 369, 382, n. 17 (1969): "In the context of labor relations law this word ['protected'] is fraught with ambiguity. 'Protected conduct' may, for example, refer to employee conduct which the States may not prohibit, see, e.g. *Weber v. Anheuser-Busch, Inc.*, 348 US 468 (1955) or to conduct against which the employer may not retaliate, cf. e.g., *NLRB v. Truck Drivers*, 353 US 87, 96 (1957)."

[43] Even though this Court has, when presented with the issue, held non-employee picketing in fact protected from state restraint without explicitly discussing the point. *Int. Longshoremen's Assn. v. Ariadne Shipping Co.*, 397 US 195, 196-197 (1970); *NLRB v. Nash-Finch Co., supra.*

surviving remnant of its five to four holding in *Briggs-Stratton*. From what has been said in Point I above, it seems obvious that subsequent decisions of this Court have effectively drained that 1949 decision of its vitality. It has had no progeny in subsequent holdings here, and has not been cited in any preemption opinion of this Court for over ten years. Already, this Court has twice repudiated its "approach" as providing inadequate protection for federal concerns.[44] But state courts have divided as to whether its substantive holding remains viable;[45] and absent review, the decision below may well give it new life.

Leading scholars have observed that the substance of *Briggs-Stratton* was, in steady progression, undermined by *Garner*,[46] rejected in *Garmon*,[47] overruled inferentially by *Insurance*

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[44] See, e.g., *Garmon*, 359 US at 245, n. 4, and *Lockridge*, 403 US at 291. "For the reasons outlined above none of these approaches provided satisfactory . . . and each [including *Briggs & Stratton*] was ultimately abandoned. . . . [E]xperience . . . taught that each of these methods sacrificed important federal interests in a uniform law of labor relations . . . without yielding anything in return by way of predictability or ease of judicial application."; *Insurance Agents*, 361 US at 493, n. 23. "A now discarded approach to pre-emption;" "A decision rendered long ago".

[45] Compare *Holland Motor Express v. Michigan Employment Security Commission*, 42 Mich. App. 19, 201 NW 2d 308 (1972) and *Simpkins v. Painters Dist. Council 57*, 20 Idaho 1, 82 LRRM 2870 (1973).

[46] In 1958, Professor (now US Court of Appeals Judge) Paul R. Hays, wrote of *Briggs-Stratton*: "But under the logic of *Garner*, it, too, would be preempted, and I do not believe that any attempt to extend *Briggs-Stratton* beyond its exact facts would be successful. And this warning would apply even to conduct which has been held by the Board, much more clearly than had the conduct involved in *Briggs-Stratton*, to be unprotected, though not prohibited." Hays, "State Courts and Federal Preemption", 23 Mo. L. Rev. 373, 376.

[47] After *Garmon*, Professor Harry Wellington questioned whether *Briggs-Stratton* was "supportable" where the work stoppages were not "associat[ed] with potential violence . . . this weightiest of state interests" and said "the answer is no (and I assume that without this association intermittent work stoppages are still, as a matter of

Agents,[48] and felled in *Morton*.[49] Indeed, in *Insurance Agents*, the National Labor Relations Board advocated outright reversal of *Briggs-Stratton* and, in the opinion, this Court consistently referred to its "substantive" holding in *dubitante* terms.

> "We may agree *arguendo* . . . that this Court's decision in the *Briggs-Stratton* case . . . established that the employee conduct here was not a protected concerted activity. . . ."
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> * * * * * * *
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> "[*R*]*egardless of the status today* of other *substantive* rulings in the *Briggs-Stratton* case * * * [T]o view *Briggs-Stratton* as controlling on the § 8 issue would be to compound the defects of a *now discarded approach* to preemption; it would amount to saying that the Board [is] foreclosed . . . by a *decision rendered long ago* * * * *Perhaps* this element of the *Briggs-Stratton* decision [that '§ 13, unlike § 7, was not an inhibition on state power'] *has become open also*." 361 US 492, 493, n. 23 (emphasis added.)

Such considerations have prompted this Court to grant certiorari, particularly when the questioned precedent has not merely been reaffirmed but extended in the decision below.[50]

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federal law, outside the protection of Section 7." For one thing, he reasoned, to allow the state to "add its sanction to the employers could . . . upset the delicate bargaining balance established by federal law." For another, "no tribunal except the NLRB is to be trusted with expounding in the first instance the meaning of Section 7." Wellington, "Labor and the Federal System", 26 *U. of Chi. L. Rev.* 542, 550, 552.

[48] "[I]t would seem to follow a fortiori that state courts and agencies may not interject their standards of 'unjustifiable' or 'abusive' economic weapons into the context of a collective bargaining dispute". Michelman, "State Power to Govern Concerted Employee Activities", 74 *Harv. L. Rev.* 641, 669.

[49] Ratner, "New Developments in Federal State Jurisdiction", *15th Ann. NYU Conf. on Labor* 47, 54-55; Cox, *supra*, 85 *Harv. L. Rev.* at 1348, 1352; Lesnick, *supra*, 72 *Col. L. Rev.* at 474.

[50] See, e.g., *Malloy v. Hogan*, 378 US 1 (1965); *Gideon v. Wainwright*, 372 US 335, 338 (1963) and *Republic Steel v. Maddox*, 379 US 650, 652 (1965).

Understandably, state courts are reluctant to anticipate action by this Court in overruling prior precedent, particularly when it affirmed a decision of the same court sustaining the state's statute. But this Court's essential role as the ultimate guardian of federal labor policy coupled with its institutional inability to proceed on a case-by-case basis in reversing state court pronouncements on the subject make it imperative that the labor preemption decisions of this Court represent a reasonably coherent synthesis so that state courts can largely police themselves. *Briggs-Stratton*, both in its substance and approach, represents a discordant, anachronistic and mischievous holding that it is now time for this Court to review and put entirely to rest; most importantly, because its substance conflicts with federal labor policy as pronounced in subsequent decisions of this Court, but also because, so long as its holding remains expressly unreversed, the decision below illustrates that state tribunals may be unwilling to repudiate its approach.

CONCLUSION

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted

ROBERT E. GRATZ

GERRY M. MILLER
Attorneys for Petitioners

August, 1975

APPENDIX

APPENDIX A

Office of the Clerk
Supreme Court
State of Wisconsin

Robert O. Uehling
Clerk

Madison, May 6, 1975

To Michael, Best & Friedrich,
Milwaukee

Goldberg, Previant & Uelmen,
Milwaukee

Charles D. Hoornstra,
A.A.G.

Sir:—The Court today announced decision in your case as follows:

Lodge 76, International Association of Machinists, etc. v. WERC et al., No. 405.

Motion for Rehearing Denied Without Costs

No opinion filed.

Respectfully yours

ROBERT O. UEHLING
Clerk of Supreme Court

APPENDIX B

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and another, Appellants, v. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent: KEARNEY & TRECKER CORPORATION, Intervenor-Respondent.*

No. 405. Argued February 3, 1975.—Decided March 4, 1975.

APPEAL from a judgment of the circuit court for Milwaukee county: ROBERT W. LANDRY, Circuit Judge. *Affirmed.*

The judgment appealed from granted enforcement of an order of the Wisconsin Employment Relations Commission which directed the appellant Lodge to cease and desist from authorizing, encouraging or condoning any concerted refusal of the employees of Kearney & Trecker Corporation to accept overtime assignments.

Kearney & Trecker Corporation was a party to a collective bargaining agreement with Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO and District No. 10 International Association of Machinists and Aerospace Workers, AFL-CIO. The agreement terminated June 19, 1971. A second agreement became effective July 23, 1972, and expired July 22, 1973.

During negotiations for this second agreement a bargaining impasse developed concerning the work week. The employer wanted to have a forty-hour week with a time and-a-half pay rate for work over eight hours in a day and forty hours in a week. The union wanted to retain the prior schedule of thirty-seven and

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* Motion for rehearing pending.

one-half hours a week with overtime rates applicable for work over seven and one-half hours a day and thirty-seven and one-half hours in a week.

On March 1, 1972, the employer announced that it was implementing its forty-hour week proposal effective March 12, 1972. On March 7th, the union membership authorized a strike and further resolved that no union member would work overtime, overtime being defined as work in excess of seven and one-half hours a day or thirty-seven and one-half hours a week. The employer and the union met on March 10th and 11th in unsuccessful attempts to resolve the issue. The employer did not implement its forty-hour week proposal on March 12th or at any time later.

On March 16, 1972, the union "remind[ed]" its members that even though negotiations were still underway, the policies voted on by the membership "will continue in effect until a labor agreement is signed."

Prior to March 7th only five percent of the employees declined overtime work. As many as 354 worked on Saturday, March 4th. After the union's March 7th meeting, however, all but three employees refused to work overtime. The employer suffered substantial damages as a result.

The employer's business is the manufacture of machine tools. Its business affects interstate commerce. Labor management relations between the employer and the union are subject to the National Labor Relations Act.

On June 12, 1972, the employer filed with the National Labor Relations Board (NLRB) a charge that the union had violated sec. 8 (b) (3) of the National Labor Relations Act, 29 U.S. Code, sec. 158 (b) (3) (NLRA) by its ban on overtime. On June 27, 1972, the NLRB regional director refused to

issue a complaint on the ground that the union's action was not prohibited by the NLRA. That refusal stated, in part:

> "Dismissal by this agency does not necessarily preclude the Charging Party [Kearney & Trecker] from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said act."

On June 15, 1972, the employer filed a complaint with the Wisconsin Employment Relations Commission (commission). After hearing, the examiner found that the union had authorized, encouraged and condoned the employees' concerted refusal to work overtime, that the effect of that action was to interfere with the company's production and that the union had therefore violated sec. 111.06(2) (h), Stats. The examiner rejected the union's challenge to the commission jurisdiction, concluding that its refusal to work overtime was neither an activity arguably "protected" under sec. 7 of the NLRA nor an activity arguably "prohibited" under sec. 8 of the act. The commission adopted the examiner's findings and orders as its own.

The union petitioned the circuit court for Milwaukee county for review of the commission's order. The commission counter-petitioned for enforcement. The circuit court entered its judgment affirming and enforcing the commission's order. The union appeals.

For the appellants there were briefs by *Goldberg, Previant & Uelmen*, attorneys, and *Robert E. Gratz* and *Gerry M. Miller* of counsel, all of Milwaukee, and oral argument by *Mr. Miller* and *Mr. Gratz*.

For the respondent the cause was argued by *Charles D. Hoornstra*, assistant attorney general, with whom on the brief was *Robert W. Warren*, attorney general.

For the intervenor-respondent there was a brief by *Michael, Best & Friedrich*, attorneys, and *James C. Mallatt, Jacob L. Bernheim* and *John R. Sapp* of counsel, all of Milwaukee, and oral argument by *Mr. Sapp*.

A brief amicus curiae was filed by *Zubrensky, Padden, Graft & Bratt* of Milwaukee for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.

HANLEY, J. The sole issue involved upon this appeal is whether the State of Wisconsin is precluded from enjoining a concerted refusal to work overtime which is in violation of sec. 111.06(2)(h) of the Wisconsin Statutes.

The union's conduct is not denied. They challenge the state's authority to enforce the statute, sec. 111.06(2)(h).

The union makes two arguments in support of its position that the state does not have the power to restrain peaceful concerted activities by unions. The first is that such activities are "permitted" by the NLRA and as such are not subject to state restraint. The second is that the state lacks the power to restrain such activities as are involved here because such conduct is arguably protected by the NLRA.

The respondents argue that conduct involved here was not permitted by the NLRA. They further argue that such conduct was not protected by the NLRA and that the permitted category is inapplicable in this case.

In *Automobile Workers v. Wisconsin Employment Relations Board* (1949), 336 U.S. 245, 69 Sup. Ct. 516, 93 L. Ed. 651, rehearing denied 336 U.S. 970, 69 Sup. Ct. 935, 93 L. Ed. 1121 (hereinafter *Briggs and Stratton*), the United States Supreme Court reviewed a decision of this court which had upheld a board order requiring a labor union to cease and desist from instigating certain intermittent and unannounced work stoppages in an employer's plant. The supreme court

held that it could find no basis for denying this state the power to regulate a cause of conduct neither made a right under nor a violation of federal law. The court stated:

> ". . . While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states." 336 U.S. at 253.

The court went on to determine that the conduct of the union was not subject to regulations by the federal board and that the activity was not protected by sec. 7 of the NLRA.

Subsequent to that decision, the supreme court has considered this issue in a number of cases. In *Garner v. Teamsters Union* (1953), 346 U.S. 485, 74 Sup. Ct. 161, 98 L. Ed. 228, the court affirmed a Pennsylvania Supreme Court decision which held that a state court could not enjoin certain picketing by a union. The court stated:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . ." 346 U.S. at 490.

It was noted that the policy of the Labor Management Relations Act (LMRA) is not to condemn all picketing and that the detailed prescription of a procedure for restraint of specified types of picketing implies that other picketing is to be free of other methods and sources of restraint. ". . . For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." 346 U.S. at 500. It was recognized though, that the LMRA does leave much to the states.

Garner, the union says, holds that states cannot regulate peaceful economic weapons left free by federal law. However, *Garner* dealt with an area Congress had "taken in hand," namely, inducements to union membership. Therefore, Pennsylvania procedures and processes could not operate. In *Garner*, a national labor act purpose was frustrated by the state action. That is not the situation in the instant case.

In *San Diego Unions v. Garmon* (1959), 359 U. S. 236, 79 Sup. Ct. 773, 3 L. Ed. 2d 775, a California court had awarded damages for picketing which it concluded violated not only state law but also sec. 8 (b) (2) of NLRA. The United States Supreme Court reversed holding that:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by sec. 7 of the National Labor Relations Act, or constitute an unfair labor practice under sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. . . .
>
> ". . .
>
> ". . . When an activity is arguably subject to sec. 7 or sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National

> Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 244, 245.

We think *Garmon* amplified the protected-prohibited test set forth and declined to follow the "approach" of ***Briggs and Stratton*** under which the court itself determined the protected or prohibited nature of the activity.

That only the "approach" rather than substantive rulings of *Briggs and Stratton* was rejected is clear from the statement cited by appellants at page 14 of their brief.

> "The approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application." (359 U. S. at 245, fn. 4.)

The rules on pre-emption in the area of labor law were stated to be as follows in *Hanna Mining Co. v. Marine Engineers* (1965), 382 U. S. 181, 86 Sup. Ct. 327, 15 L. Ed. 2d 254:

> "The ground rules for pre-emption in labor law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a State may not regulate conduct arguably 'protected by sec. 7, or prohibited by sec. 8' of the National Labor Relations Act, see 359 U. S., at 244-246; and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation, cf. 359 U. S., at 245. . . ." 382 U. S. , at 187, 188.

Despite these ground rules, the court reversed a decision of this court which had held that the state court lacked subject matter jurisdiction because the picketing involved arguably violated sec. 8 of the Federal Labor Act. The picketing was part of an effort by a union which had represented supervisors. The court held that because supervisory workers were involved the

activity was not arguably protected and also that it was not "in the respects immediately relevant prohibited by it."

It further held that Congress had not taken a policy of laissez faire toward supervisors which would oust state authority. 832 U. S. at 188, 189.

In *Motor Coach Employees v. Lockridge* (1971), 403 U. S. 274, 91 Sup. Ct. 1909, 29 L. Ed. 2d 473, rehearing denied, 404 U. S. 874, 92 Sup. Ct. 24, 30 L. Ed. 2d 120, the court reaffirmed the *Garmon* rules. The court once again pointed out that it could not declare that all local regulations involving the complex interrelationships between employers, employees and unions has been pre-empted and that ". . . much of this is left to the states." 403 U. S. at 289. The court reaffirmed the "arguably protected-arguably prohibited" test of *Garmon*, however, and held a state court did not have jurisdiction in an action by an employee against his union based on an alleged breach of conduct by the union in procuring the employee's discharge from employment because the conduct involved was arguably protected or prohibited by the NLRA.

This court has recognized these principles of pre-emption in the area of labor law. It was held in *Wisconsin Employment Relations Comm. v. Atlantic Richfield Co.* (1971), 52 Wis. 2d 126, 187 N. W. 2d 805, that the WERC was not prohibited from regulating collective bargaining in one-man bargaining units because the NLRB lacks jurisdiction in such cases and no national labor act purpose was frustrated by such state action.

The union here argues that their activity was arguably protected by the NLRA and, therefore, pre-emption exists. Initially, it had moved to dismiss the complaint before the WERC because the activity was arguably prohibited. The respondents take the position that it is neither.

In this case the only action on the national level was the NLRB's regional director's letter refusing to issue a complaint.

The regional director stated that "this action does not appear to be in violation of the act." The trial judge noted in his decision that the failure of the federal agency to take affirmative action does not confer power to act on the state. It is true that a letter from the regional director itself does not resolve the question with the clarity necessary to avoid pre-emption. However, in *Garmon* it was recognized that "compelling precedent" may provide that clear determination by the board.

The union does not contend here that the conduct is prohibited. The Supreme Court's decision in *Labor Board v. Insurance Agents* (1960), 361 U. S. 477, 80 Sup. Ct. 419, 4 L. Ed. 2d 454, makes it clear that activity of this nature is not prohibited. There the union members were engaged in harassing tactics including the refusal for a time to solicit new business, refusal to comply with company recording procedures, refusal to perform customary office duties and other activities. The NLRB held that such activities constituted a violation of sec. 8 (b) (3) of the NLRA, as amended, which makes the refusal to bargain collectively with an employer an unfair labor practice. The supreme court, in affirming a court of appeals decision setting aside the board's order, held that the board could not regulate "economic weapons" under the section requiring collective bargaining. Therefore, the activity involved here, the concerted refusal to work overtime, is not prohibited by the act. In refusing to issue a complaint in this case, the regional director relied on the *Insurance Agents Case*. The case merely holds that the NLRB had no power to regulate strike tactics and left regulation of strike tactics to the states. The case distinguishes between the power of the states to deal with strike tactics and the power of NLRB to deal with strike purposes. *Briggs and Stratton* is authority for this position.

The union does, however, argue that the conduct here is protected by sec. 7 of the NLRA. It relies heavily on the case of *Dow Chemical Co.* (1965), 152 NLRB 1150. That case in-

volved an employee who had engaged in activity connected with the refusal of employees to volunteer for weekend work. The NLRB held that such activity was protected concerted activity. It said:

> ". . . Here, however, Piatek's discharge was based in substantial part on her activity connected with the refusals to volunteer for work on March 7-8, and on March 7-8 the respondent's new work schedule was not yet in effect and therefore weekend work was still voluntary. In such circumstances, since the employer had already agreed to permit employees to decide for themselves whether they wished to work weekends, we cannot say employees, by refusing to volunteer for work, lost the protection of the Act because they sought to impose on their employer their own conditions of employment. . . ." 152 NLRB at 1152.

The WERC seeks to distinguish *Dow* on two grounds. The first is that *Dow* involved the refusal to volunteer for overtime and in the case at bar the refusal was to work scheduled overtime. The second factor is that *Dow* involved no union inducement.

There may be a question as to whether *Dow* is in fact distinguishable. However, a more recent case appears to answer the question. In *Prince Lithograph Co., Inc.* (1973), 205 NLRB (No. 23, 1973), CCH, NLRB Dec. Par. 25,614, the NLRB affirmed the rulings, findings and conclusions of the administrative judge and adopted his recommended order. One of the issues involved was whether the termination and/or replacement of one employee violated the NLRA on the ground that it discouraged union membership. The employee had been discharged for refusing to work overtime as a part of a concerted refusal on the part of union members during contract negotiations and was at the direction of the local

union. Overtime was voluntary. The administrative law judge stated:

> "In the instant case the purpose of the strike was not . . . unlawful but I do not think that distinction controlling. If an overtime strike, protected by a voluntary right to refuse overtime, for an unlawful object constitutes a violation of the statute it would appear to be equally true that an overtime strike to bring economic pressure against a primary employer is unprotected despite the same contractual provision." (Slip. Op. at p. 11.)

It was held that a concerted refusal to work scheduled or requested overtime is not protected, even if that overtime is voluntary. In *Prince* as in the case here, the union imposed a ban on overtime as a bargaining tactic.

We think that *Prince Lithograph Co., supra,* rather than *Dow, supra,* controls in this case. The activity here, under *Prince,* was unprotected activity. Therefore, the activity involved in this case is not arguably protected or arguably prohibited by the NLRA. It follows that pre-emption, under this test, is not involved in this case.

The union contends that even if the activity involved in this case is not arguably protected or arguably prohibited, it is "permitted" and the state cannot regulate it. It argues that peaceful concerted activity involved here is such as to be in an area to which there is a federal policy of laissez faire and this policy is part of the balance struck by regulation of these "permitted" activities.

The respondents both argue that the permitted rule only applies to areas where Congress has focused on similar conduct and not touched the particular conduct involved. They assert that this is not the case here and, therefore, if the application of the arguably protected or prohibited test does result in pre-emption, then the states are free to regulate in

this area. The WERC also takes the position that the "permitted" category only applies where the NLRB could act and does not apply to the strike tactic situation.

As has already been noted, the supreme court in *Briggs and Stratton* held that it could find no basis for denying this state the power to regulate a course of conduct neither made a right nor a violation of the federal law. The approach taken in that case has been changed, as has been discussed above, by *Garmon, supra.* The court has not, however, expressly overruled its decision in that case that a state can regulate such conduct.

Appellants rely heavily upon the decision of the United States Supreme Court in *Teamsters Union v. Morton* (1964), 377 U.S. 252, 83 Sup. Ct. 1253, 12 L. Ed. 2d 280, in challenging the application of the arguably prohibited or protected test. In *Morton* the action was brought pursuant to sec. 303 of the Labor Management Relations Act which authorized suit by any person injured as a result of a special secondary conduct prohibited by the act.

The Ohio Federal District Court found the union had violated sec. 303 by inducing and encouraging employees of a neutral employer to stop using the trucks of the plaintiff in order to force the neutral employer to stop doing business with the plaintiff. The supreme court affirmed this finding of a "clear violation of sec. 303." 377 U.S. at 256.

The union in *Morton* had, however, engaged in another instance of secondary boycott activity, a direct approach by the union to a neutral employer to persuade it not to do business with the plaintiff. Although finding that such activity was not in violation of sec. 303 since the union had approached the neutral employer directly rather than through its employees, the court, nevertheless, awarded damages on the basis of state common law. The supreme court affirmed the dis-

trict court's award of damages under sec. 303, but it reversed the awards based on the Ohio law dealing with secondary boycotts.

The supreme court reversed the latter award even though assuming that at least some of the secondary activity involved was neither protected nor prohibited, noting:

> "The type of conduct to be made the subject of a private damage action was considered by Congress, and sec. 303(a) comprehensively and with great particularity 'describes and condemns specific union conduct directed to specific objectives.'" 377 U.S. at 258.

The court concluded:

> "If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted sec. 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, . . ." 377 U.S. at 259, 260.

In *Morton* the fact of congressional focus showed that the activity was beyond state jurisdiction. Such is not the case here. Unlike the very comprehensive statutory treatment of secondary boycotts, Congress has not "focused upon" partial or "quickie" strikes. Policing of such conduct is left wholly to the states.

We agree with the WERC and the trial court that the doctrine of federal pre-emption does not require the WERC to refrain from relating the union's conduct in authorizing concerted refusal of employees to accept overtime assignments. Since the conduct involved in this case is not protected, prohibited or contrary to any legislative purpose of the federal labor act the judgment appealed from must be affirmed.

By the Court.—Judgment affirmed.

APPENDIX C

State of Wisconsin
Circuit Court
Milwaukee County
Civil Division

Lodge 76 International Association of Machinists and Aerospace Workers, AFL-CIO, and District No. 10 International Association of Machinists and Aerospace Workers, AFL-CIO, Petitioners, v. Wisconsin Employment Relations Commission, Respondent.	No. 410-071

This action is a review of an order of the Wisconsin Employment relations Board affirming the order of an Examiner of the Commission pertaining to a labor dispute between Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, and Kearney & Trecker Corporation. The order appealed from requires the Union to immediately cease and desist from authorizing, encouraging or condoning any concerted refusal to accept overtime assignments at the complainant's Milwaukee area plants.

As a result of a complaint filed with the Wisconsin Employment Relations Board on June 15, 1972, an Examiner of the Commission conducted a hearing and determined that the Union was in violation of Section 111.06 (2) (b) and 111.06 (3), Wis. Stats., prohibiting a union from engaging in a concerted effort

to interfere with the employer's production by other means than by leaving the premises in an orderly manner for the purpose of going on strike. On April 23, 1973, the order was affirmed by the Commission, and on May 7, 1973, the Union petitioned for a review. The Commission counter petitioned for enforcement of its order on May 15, 1973, and the court allowed the employer to intervene on May 24th.

The parties agree that the sole issue presented is whether or not federal law preempted the power of the State of Wisconsin to prohibit interference with production by a concerted refusal to work overtime. The matter of overtime appears to be a major issue that will face unions and employers at the negotiating table in the immediate years ahead. The merits of the respective sides of that conflict are not now before the court. The more narrow issue confronting this case is whether the federal law prevents the Wisconsin Employment Relations Board from exercising its authority under the laws of the State of Wisconsin regarding this area.

The role of the court is defined by Section 227.20 (1), Wis. Stats., which provides that the court confines itself to the record and may affirm, reverse, or modify the decision (order) of the administrative agency. One of the grounds for review is that the decision was "in excess of statutory authority or jurisdiction of the agency or affected by other error of law."

In the case at bar the employer filed a complaint with the Wisconsin Employment Relations Board charging the Union with having engaged in a specific unfair labor practice within the meaning of Section 111.06 (2) (b), (h) and (3). The findings of fact contained in Paragraph 13 are undisputed that the Union engaged in a concerted effort to encourage its members to refuse to work overtime. The order requiring them to cease and desist from this activity is challenged on the ground it exceeds the authority of the Commission under the doctrine of preemption.

The doctrine of preemption is well established in labor law where the United States Supreme Court denied to the states the power to regulate labor disputes in those areas which Congress chose to exercise its authority by the enactment of the National Labor Relations Act and creating an agency to carry out its mandate. To effect the ends of the Act, to promote uniformity of regulation throughout the nation, and establish an expert body to interpret the Act and adopt implementing regulations, Congress declared, and the United States Supreme Court ruled, that the Board had exclusive jurisdiction in the area encompassed by the Act. The entire field of labor, however, is one in which there is overlapping or dual jurisdiction possessed by the federal and state government. The Wisconsin Employment Peace Act is a viable and active instrument in resolving labor disputes which lie outside the perimeters of federal legislation.

On June 27, 1972, the employer's application for a complaint filed with the National Labor Relations Board was dismissed by the Regional Director on the grounds that the conduct of the Union does not appear to be in violation of the Act. The letter dismissing the application stated, "Dismissal by this agency does not necessarily preclude the charging party from pursuing the rights under the statutes other than the National Labor Relations Act, or matters not covered by the Act." Dismissal of an application for a complaint by the National Labor Relations Board does not constitute a determination that the subject matter is not preempted. When the Company filed its complaint with the Wisconsin Employment Relations Board, the Union moved to dimiss the complaint on the grounds of federal preemption, but the Examiner denied the motion. On appeal the Commission affirmed that ruling. The same issue is now the exclusive matter in this appeal to the court.

Both parties agree that the ultimate forum for deciding the issue of the right of an employer to require an employe to work overtime is collective bargaining. Collective bargaining has

proved to be the enduring agency that allows for maximum potential development of both labor and industry. The enactment of the National Labor Relations Act and the Wisconsin Employment Peace Act were designed to make the collective bargaining affair proceed with a minimum of economic loss to management, labor, and the public.

Is the conduct of the Union the kind of activity that Congress intended should be untouched by either federal or state control as being an intrinsic part of the collective bargaining process? Nothing in the National Employment Relations Act expressly permits or expressly prohibits the Union from persuading its members to refuse overtime employment. The parties have been engaged in negotiations, and the issue of overtime as related to the conflict between employer and Union regarding the employer's effort to change the labor contract from a 37½-hour week to a 40-hour week.

Section 111.06 of the Wisconsin Employment Peace Act contains numerous provisions constituting unfair labor practices by the employer and the employe which may be enforced by submission of a complaint to the Commission. Federal law has preempted certain activities contained in Sections 7 and 8 of the National Labor Relations Act, but no case has been cited which declares that Subsection 2, (2) (h) of the Wisconsin Statutes relied upon by the Commission has become inoperative by reason of preemption.

The Union cites *National Labor Relations Board v. Insurance Agents International Union*, AFL-CIO, 361 U. S. 477 (1959) as authority for designating certain union activity as being outside the legally proscribed conduct even during negotiations. In that case the employes arrived late, neglected reports, left early, failed to cooperate in promotional schemes, but continued to sit at the bargaining table in a good faith effort to arrive at a contract.

The Supreme Court, in reversing the National Labor Relations Board, declared that the tactics used by the union do not support the finding that it failed to bargain in good faith. Section 8-B-3 of the Act does not prohibit the use of economic pressure. "Congress," said the court, "did not intend and has not authorized the Board to determine what economic sanctions might be permitted the negotiating parties in an ideal or a balanced state of collective bargaining."

To conclude from this language that the State is barred by the doctrine of preemption is a giant step. The decision does not hold that state law does not apply, and to infer from the language employed by the court that it did would be tenuous. Before a provision of the Wisconsin Peace Act is declared a nullity, a more definitive basis must be relied upon. The tendency on the part of the Federal Government to participate more aggressively in the field of labor disputes may ultimately provide the stepping stones to extend federal authority either by legislation or court decision, but until then state activity is not denied by preemption on the basis of the Insurance Agents case.

In *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1958), the question of preemption again arose with respect to Sections 7 and 8.

> "We have necessarily been concerned with the potential conflict of two law enforcing authorities with the disharmonies inherent in two systems, one federal, the other state, of inconsistent standards of substantive law and differing remedial schemes, but the unifying consideration of our decisions has been in regard to the fact that Congress has entrusted administration of the labor policy for the nation to a centralized administrative agency armed with its own procedures and equipped with its specialized knowledge and cumulative experience."

The Union argues that Garmon is authority for the contention that where activity is clearly or arguably protected or prohibited by the Federal Act, state jurisdiction must yield. The key correlary to this principle enunciated by Justice Frankfurter is that where activity is neither prohibited or protected and, further, where the National Labor Relations Board fails to act, does not mean an automatic grant of authority and power to the states.

The guideline "where activity is clearly or arguably protected or prohibited" is used in other cases. The court's conclusion is that this activity is not arguably subject to the provisions of Section 7 or 8 of the Federal Act.

It is conceded by all parties that the record discloses that the Regional Director of the National Act dismissed the complaint of the Company on the ground that the complaint failed to set forth a violation of the Act. The failure on the part of the Federal Agency to take affirmative action does not confer power upon the state to act. The last bar to state jurisdiction is stated in the Frankfurter correlary. No standard, criteria, or clear principle has been set forth to invoke the Frankfurter correlary to this case. No persuasive reason has been announced to cause the court to conclude that the state law should be swept away on the basis of the cautionary dictum set forth in the Garmon case.

It is clear from the court's rulings that Sections 7 and 8 do not dominate the area of activity by a union engaged in the kind of activity at bar to sweep away state law. The Briggs & Stratton case, where the union engaged in concerted activity by holding frequent and irregularly scheduled meetings during working hours to the inconvenience of the production of the company, the authority of the Wisconsin Employment Relations Board to intervene with the application of state law was approved by the court. This case has never been overruled. *International Union UAW-AFL, Local 232 v. WERB*, 336 U. S. 245.

In order for the doctrine of preemptiion to take effect either the words of the National Labor Relations Act, the courts' decisions, or the declarations of the Board should manifest authority over the area concerned. No authority has been cited which satisfied the court that such an intention has ever been made in the area that was ruled upon by the Wisconsin Employment Relations Board in the instant case.

The petition to review, to overrule the Wisconsin Employment Relations Board, is denied. Its order is affirmed.

Counsel for the respondent is to prepare an order in conformity with this decision. A hearing will be held in Room 504 of the Courthouse before Branch 6 of the Circuit Court for Milwaukee County for consideration of further orders pertaining to this case, providing 72 hours' notice is given by the moving party.

Dated, Milwaukee, Wisconsin, August 24, 1973.

/s/ ROBERT W. LANDRY
Circuit Judge

APPENDIX D

State of Wisconsin

Before the Wisconsin Employment Relations Commission

Kearney & Trecker Corporation, Complainant, vs. Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, Respondents.	Case XI No. 15745 Cw-333 Decision No. 11083-C

Order Affirming Examiner's Findings of Fact, Conclusions of Law and Order

Examiner George R. Fleischli having, on February 26, 1973, issued his Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above entitled matter, and on March 13, 1973, the above named Respondents, by their Counsel, having timely filed a Petition for Review of said Examiner's decision; and on April 12, 1973, the Respondents, by their Counsel, having filed a brief in support of their Petition for Review; and the Commission having reviewed the record, the decision of the Examiner, the Petition for Review, and the brief filed in support thereof, being fully advised in the premises and being satisfied that the Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, issued by the Examiner should be affirmed;

Now, Therefore, it is

Ordered

That, pursuant to Section 111.07(5) of the Wisconsin Statutes, the Wisconsin Employment Relations Commission hereby adopts the Examiner's Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, issued in the above entitled matter as its Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, and, therefore, the Respondent, Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, shall notify the Wisconsin Employment Relations Commission within ten (10) days of the receipt of a copy of this Order as to what steps it has taken to comply therewith.[1]

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of April, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By MORRIS SLAVNEY /s/
MORRIS SLAVNEY, Chairman

ZEL S. RICE II /s/
ZEL S. RICE II, Commissioner

JOS. B. KERKMAN /s/
JOS. B. KERKMAN, Commissioner

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[1] In its Petition for Review the Respondent Lodge objected solely to the Conclusions of Law made by the Examiner, contending that the controversy was moot, and further that the activity involved in the matter was pre-empted by the National Labor Relations Board.

The same issues were raised in the proceeding before the Examiner. He dealt with such issues in his Memorandum, and we affirm his Findings of Fact, Conclusions of Law and Order, and we also adopt his well-reasoned rationale in his Memorandum with regard to the issues involved.

State of Wisconsin

Before the Wisconsin Employment Relations Commission

Kearney & Trecker Corporation, Complainant, vs. Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, Respondents.	Case XI No. 15745 Cw-333 Decision No. 11083-A

Appearances:

Peck, Bridgen, Petajan, Lindner, Honzik & Peck, S.C., Attorneys at Law, by *Mr. Egon W. Peck*, appearing on behalf of the Complainant.

Gratz, Schneidman and Myers, Attorneys at Law, by *Mr. Robert E. Gratz*, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter; and the Commission having appointed George R. Fleischli, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint

having been held at Milwaukee, Wisconsin, on July 14, 1972 and August 3, 1972 before the Examiner, and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact

1. That Kearney & Trecker Corporation, hereinafter referred to as the Complainant, is a corporation engaged in the manufacture of machine tools at several Milwaukee area plants and an employer within the meaning of Section 111.02(2) of the Wisconsin Statutes; that Complainant is engaged in a business affecting commerce within the meaning of the National Labor Relations Act, as amended, and is covered by the self-imposed jurisdictional standards of the National Labor Relations Board referred to in Section 14(c)(1) of that Act, as amended.

2. That Lodge 76 of District No. 10 of the International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the Respondent Lodge is a labor organization having offices at 11000 Theodore Trecker Way and 8022 West Becher Street, Milwaukee, Wisconsin, and represents all hourly employes employed by the Compiainant at its Milwaukee area plants including leadmen, set-up men, and group leaders but excluding officers of the Corporation, department heads, foremen, assistant foremen, salaried office and salaried shop clerical employes, safety men, students, time study men and all other salaried professional and technical employes, guards and supervisors for purposes of collective bargaining on questions of wages, hours and working conditions; that the Respondent Lodge is affiliated with the Respondent District No. 10 of the International Association of Machinists and Aerospace Workers, AFL-CIO.

3. That District No. 10 of the International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the Respondent District is a labor organization with offices at 624 North 24th Street, Milwaukee, Wisconsin.

4. That on May 14, 1969, the Complainant and the Respondent Lodge entered into a collective bargaining agreement covering the wages, hours and working conditions of the employes represented by the Respondent Lodge, hereinafter referred to as the prior agreement, effective from 11:00 p.m. March 3, 1969 until 11:00 p.m. on February 28, 1971, and thereafter unless either party gave timely notice of its intent to terminate said agreement; that the Complainant gave the Respondent Lodge timely notice of its intent to terminate said agreement on June 19, 1971 and said agreement was terminated on that date; that representatives of the Complainant and Respondent Lodge met on numerous occasions beginning in October 1970 and continuing until on or about July 23, 1972 for the purpose of negotiating with regard to certain proposed modifications or changes in said agreement; that on August 9, 1972 the Complainant and the Respondent Lodge entered into a new collective bargaining agreement covering the wages, hours and working conditions of the employes represented by the Respondent Lodge, hereinafter referred to as the current agreement, effective from 11:00 p.m. on July 23, 1972 until 11:00 p.m. on July 22, 1973 and thereafter unless either party gives timely notice of its intent to terminate said agreement.

5. That in accordance with the terms of the prior agreement and in conformity with a practice extending over a number of years the basic work week for employes represented by the Respondent Lodge consisted of seven and one-half hours per day, Monday through Friday, for a total of thirty-seven and one-half hours per week and that all hours worked in excess of seven and one-half hours per day or thirty-seven and one-half hours per week were compensated at overtime rates; that at the outset of

the negotiations leading up to the current agreement the Complainant proposed *inter alia* that the basic work week for employes represented by the Respondent Lodge be changed to consist of eight hours per day, Monday through Friday, for a total of forty hours per week and that in the future all hours worked in excess of eight hours per day or forty hours per week would be compensated at overtime rates; that said proposed change in the basic work week, which was accompanied by an offer to increase the hourly rate of pay and improve certain fringe benefits, was deemed unacceptable by the representatives of the Respondent Lodge and the parties reached an impasse in their negotiations with regard to said proposal and certain other proposals; that on June 22, 1971 the Complainant advised the Respondent that even though an impasse had been reached in the negotiations and the prior agreement had been terminated it intended to continue to follow the provisions of the prior agreement "except as you may be notified otherwise by us in advance of any contemplated changes"; that the Complainant further advised the Respondent Lodge of its intent to make certain changes, not affecting the basic work week, effective with the beginning of the work week of June 28, 1971 and that said changes were thereafter made.

6. That the parties remained at an impasse in their negotiations with regard to the Complainant's proposal to change the basic work week and certain other proposals until March 1, 1972 on which date the Complainant notified the Respondent Lodge by letter of its intent to implement said proposal; that said letter, which was subsequently sent to all production and maintenance employes along with a letter of explanation on March 3, 1972, read as follows:

> "One of the items which was negotiated to an impasse was the Company's '40-hour work week proposal; concerning which our production and maintenance employees were advised in a communication we sent to them May 13, 1971.

In it we stated, with reference to the 40-hour work week proposal, that it is the Company's intention to put the 40-hour week into effect 'when the increase in production would otherwise make recalls necessary.'

As you know, we are now working overtime in many areas. Under these circumstances, we can no longer delay putting the 40-hour work week into effect. In the light of the above, we hereby notify you that effective with the work week beginning on March 13, 1972 (with the third shift starting at 11:00 p.m. on Sunday, March 12, 1972), the 40-hour work week proposal will become effective.

This decision will have the following effect:

(1) The wage rate of all employees will be increased by seven cents (7¢) per hour.

(2) The regular weekly work schedule will be 40 hours instead of the previous 37½ hours and the daily work schedule will be 8 hours instead of 7½ hours. (With a 24-minute unpaid lunch period instead of the previous 30-minute unpaid lunch period.)

(3) Time and one-half at the new higher rate will be paid for all hours worked in excess of 8 per day, instead of the previous 7½ hours per day, and for all time in excess of 40 hours per week instead of the previous 37½ hours per week.

(4) In order to make this effective within the terms of the terminated Labor Agreement of 1969, all references and computations based on the 7½ hour day and the 37½ hour week must be changed to 8 hours per day and 40 hours per week. Among the items so affected are these:

(a) Vacation benefits will be increased to 8 hours pay for each allowable day.

(b) Holidays occurring after the effective date of the 40-hour week will be paid at 8 hours pay at the employee's vacation hourly rate.

(c) Jury duty pay will be increased to 8 hours per day.

(d) Military active duty pay reimbursement will be at 40 hours per week less military pay.

(5) As stated above, instead of the 30-minute unpaid lunch period provided for in paragraph 60 of the terminated Labor Agreement, except for the third shift, will be 24 minutes. There will be no assigned lunch period for employees working on the third shift.

(6) In conformity with our proposal that the third shift premium would be increased to make the pay for the third shift employees equivalent to 40 hours, we are increasing the third shift premium from 8% to 18%.

(7) To conform to the new 40-hour work week the schedule of hours will be as follows:

Shift First	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday
Start		7:00 am	7:00 am	7:00 am	7:00 am	7:00 am
End		3:24 pm	3:24 pm	3:24 pm	3:24 pm	3:24 pm
Hours		8.0	8.0	8.0	8.0	8.0
Total					40.0 Hours	
Second						
Start		3:24 pm	3:24 pm	3:24 pm	3:24 pm	3:24 pm
End		11:48 pm	11:48 pm	11:48 pm	11:48 pm	11:48 pm
Hours		8.0	8.0	8.0	8.0	8.0
Total					40.0 Hours	
Third						
Start	11:00 pm	11:48 pm	11:48 pm	11:48 pm	11:48 pm	11:48 pm
End	7:00 am	7:00 am	7:00 am	7:00 am	7:00 am	7:00 am
Hours	8.0	7.2	7.2	7.2	7.2	7.2
					36.8 Hours*	

*(Shift premium will make pay equivalent to 40 Hours.)

As stated in our letter to the Union dated June 22, 1971, 'The Company wants to have a Labor Agreement and will continue to negotiate to get one.' We also stated that we will otherwise continue to operate as we did previously, except for those changes which we listed and that 'if more of the changes which were proposed in the Company's letter of May 13 are to be instituted, you will be notified of them in advance.' This letter is in conformity with that promise."

7. That on or about March 3, 1972 representatives of the Respondent Lodge distributed a handbill at the plant gates which disputed certain assertions contained in the Complainant's letters of March 1, 1972 and March 3, 1972 and concluded as follows:

"ADVANCE NOTICE

A MASS MEETING IS BEING CALLED FOR TUESDAY, MARCH 7, 1:30 P.M.—SERB HALL—STRIKE SANCTION VOTE WILL BE TAKEN.

LODGE 76, IAMAW
Educational Committee"

8. That on or about March 6, 1972 representatives of the Respondent Lodge posted a notice, a copy of which was given to representatives of the Complainant which read as follows:

"LODGE 76 IAM

MASS
MEETING

MARCH 7

1:30 P.M.

SERB HALL
5101 W. Oklahoma Ave."

9. That the membership of the Respondent Lodge met at Serb Hall in Milwaukee, Wisconsin, at 1:30 p.m. on Tuesday, March 7, 1972, for the purpose of taking a strike sanction vote; that a strike sanction vote was taken at said meeting and that subsequently during said meeting two resolutions were presented to the membership and unanimously adopted which resolutions directed that no member of the Respondent Lodge should perform work in excess of seven and one-half hours per day or thirty-seven and one-half hours per week and that no member of the Respondent Lodge should work overtime.

10. That on Friday, March 10, 1972, and Saturday, March 11, 1972 representatives of the Complainant met with representatives of the Respondent Lodge for the purpose of discussing the issues in bargaining including the work week; that during the course of the first meeting representaitves of the Complainant offered to defer implementation of its forty-hour work week proposal if the Respondent Lodge would agree "that daily overtime (in excess of 7½ hours a day) shall be part of the regular work schedulue" . . . and that "employees may refuse Saturday and/or Sunday overtime as in the past", and that the Respondent Lodge responded that the Complainants offer to defer the implementation of its forty-hour work week proposal "on the basis stated" was "completely unacceptable"; that during the course of the second meeting representatives of the Complainant offered to continue the existing thirty-seven and one-half hour work week "unless and until" an agreement was reached on the basic work week if the representatives of the Respondent Lodge would agree that employes could be required to work up to thirty minutes of overtime per day and that any Saturday or Sunday overtime could be refused "on the same basis as in the past" and that the representatives of the Respondent Lodge indicated that the Complainants' offer to continue the existing thirty-seven and one-half hour schedule until an agreement was reached on the basic work week was acceptable but that the other aspects of the Complainants proposal

were "not related" and "not acceptable" and indicated its intent to continue the "moratorium on overtime."

11. That the Complainant did not implement its forty-hour work week proposal on March 12, 1972 or at any time thereafter; that representatives of the Complainant met with representatives of the Respondent Lodge on March 13, 1972 and on several dates thereafter in an effort to resolve the dispute over the work week and the other issues in the negotiations; that during the course of said negotiations representatives of the Respondent Lodge consistently and frequently referred to the resolutions of March 7, 1972 as a "mandate" or a "mandate of the membership"; that at no time after March 11, 1972 and before July 14, 1972 did representatives of the Respondent Lodge agree to ask the membership to rescind the resolutions of March 7, 1972 even though they were asked to do so by representatives of the Complainant and that on or about March 16, 1972 representatives of the Respondent Lodge made the following statement, relevant herein, in a report distributed to its membership:

> "The Educational Committee wishes to remind you that even though the talks with the Company are continuing, the Policies voted on by the Production and Maintenance Employees WILL continue in effect until a Labor Agreement is signed."

12. That by custom and understanding none of the employes represented by the Respondent Lodge had been required to work daily or weekend overtime prior to March 7, 1972 but that the average refusal rate of overtime amounted to five percent of those employes offered overtime work; that prior to March 11, 1972 employes represented by the Respondent Lodge were performing a substantial amount of daily and Saturday overtime work and that as many as 354 employes performed overtime work on Saturday, March 4, 1972; that beginning on or about March 11, 1972 and continuing thereafter until on or about

July 23, 1972 none of the employes represented by the Respondent Lodge would accept daily or Saturday overtime work (with the exception of three employes who accepted overtime work on Saturday, May 13, 1972) even though the Complainant scheduled many of said employes for daily and Saturday overtime work on numerous occasions.

13. That the refusal by the employes represented by the Respondent Lodge to work overtime, beginning on or about March 11, 1972 and continuing thereafter until on or about July 23, 1972, was a concerted effort to interfere with the production of machine tools at the Complainant's Milwaukee area plants and that such refusal did in fact interfere with said production at the Complainant's Milwaukee area plants; that the Respondent Lodge authorized, encouraged and condoned said concerted refusal to work overtime; that the record does not establish that the Respondent District in any way authorized, encouraged or condoned said concerted refusal to work overtime.

Based on the above and foregoing Findings of Fact, the Examiner makes the following

Conclusions of Law

1. That the Complainant's claim that the Respondent Lodge and the Respondent District have engaged in unfair labor practices in violation of Section 111.06(2)(h) and Section 111.06 (3) of the Wisconsin Statutes is based on existing facts and involves a real controversy over rights which may be presently asserted and is therefore not moot.

2. That the activity complained of, the concerted refusal to work overtime, is not an activity which is arguably protected under Section 7 or arguably prohibited under Section 8 of the National Labor Relations Act, as amended, and that, therefore,

the Wisconsin Employment Relations Commission is not preempted from asserting its jurisdiction to regulate said conduct.

3. That the Respondent Lodge, by authorizing, encouraging and condoning the concerted refusal to work overtime beginning on or about March 11, 1972, and continuing thereafter until on or about July 23, 1972, has engaged in a concerted effort to interfere with production and has committed an unfair labor practice within the meaning of Section 111.06(2)(h) of the Wisconsin Statutes; that the Respondent District did not, in any way, authorize, encourage or condone said concerted refusal to work overtime and has not committed any unfair labor practices within the meaning of Section 111.06(2)(h) or Section 111.06(3) of the Wisconsin Statutes.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

Order

It Is Ordered that the Respondent Lodge, its officers and agents shall:

1. Immediately cease and desist from authorizing, encouraging or condoning any concerted refusal to accept overtime assignments at the Complainant's Milwaukee area plants.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

(a) Send a copy of the letter marked "Exhibit A" and attached hereto to all employes of the Complainant, who are members of the Respondent Lodge. Said letter should be signed by the principal officer of the Respondent Lodge and directed to the employes' last known address.

(b) Immediately upon resumption of bargaining for a successor to the current collective bargaining agreement, post written notices in conformity with "Exhibit B", attached hereto, in its offices and in any places provided by the Complainant for the posting of notices. Said notices shall be signed by the principal officer of the Respondent Lodge and shall remain posted throughout said negotiations. Respondent Lodge shall take all reasonable steps necessary to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order regarding what steps it has taken to comply with this Order.

It Is Further Ordered that so much of the complaint that alleges that the Respondent District has engaged in conduct violative of Section 111.06(2)(h) and Section 111.06(3) of the Wisconsin Statutes shall be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 26th day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
By GEORGE R. FLEISCHLI /s/
GEORGE R. FLEISCHLI
Examiner

"EXHIBIT A"

To the membership:

Pursuant to an Order of the Wisconsin Employment Relations Commission all members of Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO are

hereby notified that the action taken by the membership, of engaging in a concerted refusal to work overtime during the period beginning on March 11, 1972, and continuing until on or about July 23, 1972, constituted a violation of Section 111.06(2)(h) of the Wisconsin Employment Peace Act, and that hereafter Lodge 76 will not in any way authorize, encourage or condone such conduct on the part of its membership.

.....
(Principal Officer)

"EXHIBIT B"

Notice

Pursuant to an Order of the Wisconsin Employment Relations Commission all employes of Kearney & Trecker Corporation represented by Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, are hereby notified that the action taken by the membership of said organization, of engaging in a concerted refusal to work overtime during the period beginning on March 11, 1972, and continuing until on or about July 23, 1972, constituted a violation of Section 111.06(2)(h) of the Wisconsin Employment Peace Act, and that all members of said organization are hereby asked to refrain from engaging in any concerted refusal to accept assignments of overtime work throughout the negotiations currently in progress with Kearney & Trecker Corporation.

.....
(Principal Officer)

KEARNEY & TRECKER CORPORATION, XI, Decision No. 11083-A

Memorandum Accompanying Findings of Fact, Conclusions of Law and Order

Pleadings

In its complaint which was filed on June 15, 1972, the Complainant alleged that the Respondent called a meeting of its membership on March 7, 1972 at which a resolution was adopted which directed the membership to refuse to work in excess of seven and one-half hours per day or thirty-seven and one-half hours per week[1] and that although a substantial amount of work in excess of seven and one-half hours per day and in excess of thirty-seven and one-half hours per week has been scheduled for said employes since March 7, 1972 said employes have engaged in a concerted refusal to work the additional hours as scheduled. The Complainant further alleged that the purpose and effect of said resolution and concerted action was to interfere with the production of the Complainant and that said action was therefore in violation of Section 111.06(2)(h) and Section 111.06(3) of the Wisconsin Employment Peace Act which provide:

"111.06

(2) It shall be an unfair labor practice for an employe individually or in concert with others:

* * * * * * *

(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere

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[1] The evidence presented at the hearing establishes that two similar resolutions were passed. However, the effect of both resolutions was the same. See Finding of Fact numbered 9 and discussion, *infra*, under "Violation Found".

with production except by leaving the premises in an orderly manner for the purpose of going on strike.

* * * * * * *

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

In its prayer for relief the Complainant asks that the Respondents be ordered to cease and desist from the action complained of and that they be affirmatively ordered to perform whatever acts are necessary and appropriate to insure that the employes are advised that the action complained of is illegal and that, in the future, employes should perform their obligations as employes without regard to the action taken on March 7, 1972. Hearing on the complaint was set for July 14, 1972.

On June 23, 1972 the Respondents filed a written motion to dismiss the complaint and in their motion requested that the hearing scheduled in the matter be limited to the evidence relevant to any factual issues raised by their motion. That motion alleged: (1) That the Wisconsin Employment Relations Commission lacked jurisdiction over the subject matter of the complaint in that the activity complained of was "arguably prohibited" by the National Labor Relations Act as amended and (2) that the Wisconsin Employment Relations Commission has no jurisdiction over the subject matter of the complaint in that the provisions of the Wisconsin Employment Peace Act alleged to have been violated are unconstitutional to the extent that they are in conflict with the National Labor Relations Act as amended. The Complainant objected to the Respondents' request that the hearing be limited to any factual issues raised by the Respondents' motion since there were no factual issues

raised by the Respondents' motion and alleged that the Complainant was suffering severe economic harm as a result of the action complained of. At the Examiner's request the Respondents filed their answer so as to more clearly delineate the issues of fact raised by the pleadings.

In their answer, which was filed on June 30, 1970, the Respondents admitted that a resolution was adopted at the meeting on March 7, 1972 wherein the employes agreed not to work in excess of seven and one-half hours per day or thirty-seven and one-half hours per week but denied knowledge concerning the amount of overtime scheduled subsequent to said resolution and denied the other allegations of the complaint. The answer affirmatively alleged that the Complainant was engaged in an industry affecting commerce; that the activity complained of was the subject of an unfair labor practice charge pending before the National Labor Relations Board wherein the Complainant herein alleged that said activity constitutes an unfair labor practice under Section 8 of the National Labor Relations Act, as amended; and that the complaint ought to be dismissed since it was arguably prohibited by that Act and therefore the Wisconsin Employment Relations Commission was preempted from asserting jurisdiction.

In order to expedite the handling of the case and at the same time accommodate the Respondents' request for a delay because certain witnesses were unavailable on the hearing date set, the hearing was opened as scheduled on July 14, 1972 for the purpose of allowing the Respondents to present any evidence they desired in support of their motion and to permit the Complainant to present its evidence and arguments on the merits. At the outset of the hearing, the Respondents orally renewed their motion to dismiss and the parties stipulated to the relevant jurisdictional facts. It was agreed at the conclusion of the Complainant's case that the hearing would adjourn and be reconvened if necessary at a later date at which time the Respondents would be afforded

an opportunity to present any evidence they desired to offer on the merits. The hearing was reconvened on August 3, 1972 at which time the Respondents declined the opportunity to present evidence but renewed their motion to dismiss on the additional ground that the controversy was now moot in that, after the first day of hearing and before the second day of hearing, the parties had agreed upon the terms of a new collective bargaining agreement. The parties stipulated that such agreement had been reached but the Complainant denies that the controversy is moot as a result of that agreement.

The Facts

There is no dispute over the facts relating to the question of jurisdiction. At the hearing the parties stipulated that the Complainant is engaged in an industry affecting commerce within the meaning of the National Labor Relations Act, as amended, and is covered by the self-imposed jurisdictional standards of the National Labor Relations Board. With regard to the allegation in the Respondents' answer that the subject matter in dispute is currently pending before the National Labor Relations Board, the evidence adduced at the hearing indicates that so much of the charges filed with the National Labor Relations Board[2] which alleged that the activity complained of herein constitutes a violation of the National Labor Relations Act, as amended, has been dismissed and that dismissal has not been appealed. In dismissing the charges pending before the National Labor Relations Board the Regional Director said in relevant part:

> "The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.
>
> * * * * * * *

[2] Case No. 30-CB-527.

> As to the adoption by the Union on March 7, 1972 of a policy prohibiting overtime work by its member employees, this action does not appear to be in violation of the Act. *N.L.R.B. v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477. Dismissal by this Agency does not necessarily preclude the Charging Party from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act. I am therefore refusing to issue complaint at this time.
>
> * * * * * * *"

The Complainant introduced substantial evidence supporting its allegations that the employes represented by the Respondent Lodge engaged in a concerted refusal to work overtime hours in excess of seven and one-half hours per day or thirty-seven and one-half hours per week; that said concerted refusal was in compliance with the resolutions presented and adopted by the membership of the Respondent Lodge at its meeting on March 7, 1972; and that said concerted refusal imposed severe economic hardship on the Complainant in its efforts to deal with temporary "pulse" varieties of production thereby endangering its relationship with its customers through an inability to meet production deadlines and the incurring of financial penalties contained in their contracts with the government. The Respondents introduced no evidence contradicting the Complainant's evidence regarding the impact of the concerted refusal; however, the Respondents brought out, through cross-examination of the Complainant's witnesses, the fact that certain forms of economic pressure were brought to bear on the Respondent Lodge by the Complainant through the cancellation of a lease held by the Respondent Lodge on office space in one of the Complainant's plants and the unilateral implementation of certain proposals in bargaining, including a proposal to eliminate the practice of compensating representatives of the Respondent Lodge for conducting certain representation activities during working hours.

Positions of the Respondents:

The Respondents argue that, in their view, there are two legal issues to be resolved at this juncture: (1) Should the complaint be dismissed by the Wisconsin Employment Relations Commission on the claim that the controversy is now moot?; and (2) When an activity is neither protected nor prohibited under the federal act, may a state regulate any or all such activities? The Respondents do not deny that the activity complained of constituted an interference with production but argue that the controversy is now moot and that therefore the Commission ought to dismiss the complaint. However, if the Commission does not dismiss the complaint as moot the Respondents ask that it be dismissed for lack of jurisdiction citing a number of United States Supreme Court decisions dealing with the Constitutional doctrine of preemption.

Position of the Complainant:

The Complainant contends that the controversy in question is not moot within the meaning of the case of *WERB v. Allis-Chalmers Workers Union, Local 248, UAWA-CIO*[3] and that unless a cease and desist order is issued there is reason to believe that the same tactic may be employed during the negotiations for a successor to the current collective bargaining agreement. The Complainant argues that the activity complained of is clearly a prohibited interference with production under the rationale of the *Stolper*[4] case and that there is no issue of preemption in this case in that the *Briggs-Stratton*[5] case held that state regulation of the conduct complained of is not preempted

[3] 252 Wis. 436, 21 LRRM 2699 (1948).

[4] *Stolper Steel Products Corp.* (2109) 5/49, aff'd. 258 Wis. 481, 27 LRRM 2418 (1951).

[5] *International Union, UAW v. WERB*, 336 U.S. 245, 23 LRRM 2361 (1949).

by the National Labor Relations Act, as amended. The Complainant relies upon a number of the same cases relied upon by the Respondents in support of its position with regard to the question of preemption.

Mootness

It is clear that the matter in controversy is not moot. The Wisconsin Supreme Court has defined a moot case as

> ". . . one which seeks to determine an abstract question which does not rest upon existing facts or rights or which seeks a judgment in a pretended controversy when in reality there is none or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy."[6]

If the Complainant is correct in its view of the law, the activity in question violates the public policy of Wisconsin as expressed in the Wisconsin Employment Peace Act and it has a legal right to ask that the Respondents be directed to cease engaging in that activity and take such affirmative action as might be appropriate to insure its non-recurrence. The controversy is certainly not "pretended" and the Complainant is not seeking a "decision in advance" since the complaint in this case was not filed until after the conduct had actually taken place. The only possible basis on which the controversy could be found to be moot would be on the claim that a judgment in the matter would not have any "practical legal effect".

Even though the activity complained of has ceased, the terms of the current collective bargaining agreement will be subject to

[6] *WERB v. Allis-Chalmers Workers Union Local 248, UAWA-CIO*, 252 Wis. 436, 21 LRRM 2699 at p. 2701 (1948).

renegotiation beginning in March 1973, and the agreement can be terminated by either party as early as July 22, 1973. If the Commission were to dismiss the case as moot at this point in time, the Respondents could engage in the same conduct in the future with the foreknowledge that there would be a considerable time lag between the filing of the complaint and a decision in the matter. Such conduct could frustrate the public policy expressed in the Wisconsin Employment Peace Act and would have the "practical legal effect" of leaving the Complainant with an effective remedy.

The Wisconsin Supreme Court has specifically recognized that a case that might be said to be moot by reason of the fact that the unfair labor practice complained of has ceased is not moot if it can be said that interests of a public character are asserted under conditions that may be immediately repeated.[7] This case clearly falls within the rule of that case and the Commission ought to assert its jurisdiction to make a determination in the matter

Preemption

In the *Briggs-Stratton*[8] case the United States Supreme Court held, in a divided opinion, that Wisconsin was not preempted from prohibiting a union from engaging in "quickie" strikes in violation of Section 111.06(2)(h) even though the conduct involved was concerted and arose on the context of a labor dispute with an employer engaged in interstate commerce, since the conduct involved was "not regulated" by the federal law. The majority opinion held that it was within Wisconsin's police power to prohibit such activities and that nothing in the National Labor Relations Act or the Labor-Management Relations Act "forbid"

[7] *Ibid.* at p. 441.

[8] *Supra,* footnote 5.

or "legalized" the conduct in question which was either "governable by the states * * * or entirely ungovernable". The two dissenting opinions in that case focused on the claim that the "quickie" strikes were a form of protected concerted activity and therefore unlike the situation presented in the *Allen Bradley*[9] and the *Fansteel*[10] cases which involved criminal violations and plant seizure.

The *Briggs-Stratton* case was one of the earliest cases involving the question of preemption and the Respondents argue that the *Briggs-Stratton* case must be read in the light of the many decisions rendered subsequent to that decision particularly the *Garmon* decision.[11] In the *Garmon* case the Supreme Court reviewed the numerous prior decisions dealing with the impact of the federal scheme of labor legislation on the state's authority to regulate employer and union conduct. In an effort to distill the collective wisdom of those prior cases the Supreme Court set out the following test for preemption:

> "When it is clear or may fairly be assumed that the activities which the State purports to regulate are protected by Section 7 of the Taft-Hartley Act or constitute an unfair labor practice under Section 8 due regard for the federal enactment requires that state jurisdiction must yield."[12]

[9] *Allen Bradley Local v. WERB,* 315 U.S. 740, 10 LRRM 520 (1942).

[10] *NLRB v. Fansteel Metallurgic Corp.,* 306 U.S. 240, 4 LRRM 515 (1939).

[11] *San Diego Building Trades v. Garmon,* 359 U.S. 236, 43 LRRM 2838 (1959).

[12] *Ibid.* at p. 2841. At least two exceptions were specifically recognized to the general rule:

(1) Where the activity regulated is of "peripheral concern" such as was the case in *International Association of Machinists v. Gonzales,* 356 U.S. 617, 42 LRRM 2135 (1958); and

(2) Where the regulated conduct dealt with interests so deeply rooted in local feeling and responsibility that, in the ab-

The Court further held that where it is not clear whether the particular activity regulated by the states is either protected under Section 7 or prohibited under Section 8, the primary authority to adjudicate the question is the National Labor Relations Board and that in the absence of a clear determination by the National Labor Relations Board, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. Specifically repudiating the *approach* taken to the preemption question in the *Briggs-Stratton* case the Court said:

> "If the Board decides, subject to appropriate federal judicial review, that conduct is protected by Section 7 or prohibited by Section 8 then the matter is at an end, and the states are ousted from all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States . . . In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for [the courts] to decide whether such activities are subject to state jurisdiction . . ."[13]

The fact that the Supreme Court repudiated the *approach* taken in deciding the preemption question raised in the *Briggs-Stratton* case is not the equivalent of a reversal of the result of that case and the power of Wisconsin to prohibit "quickie" strikes would appear to remain intact since it is neither a protected nor prohibited activity under the *Garmon* test.

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sence of compelling Congressional direction, the Court was reluctant to find that Congress had deprived the states of the power to act such as was true in *United Automobile Workers v. Russell*, 356 U.S. 634, 42 LRRM 2142 (1958); *United Construction Workers v. Laburnum*, 347 U.S. 656, 34 LRRM 2229 (1954); *Youngdahl v. Rainfair*, 355 U.S. 131, 41 LRRM 2169 (1957) and *Auto Workers v. WERB*, 351 U.S. 266, 38 LRRM 2165 (1956).

[13] *Ibid.* at p. 2842.

The Supreme Court recently reviewed the *Garmon* test and affirmed its continued vitality and reiterated the unacceptability of the approach taken in the *Briggs-Stratton* case in deciding the question of preemption.[14] It appears then that the question that must be answered in this case is whether the state of Wisconsin is precluded from regulating the conduct in a question when the *Garmon* test is applied to the facts in this case in the manner required.

In this case the Complainant did file charges with the National Labor Relations Board which charges were dismissed as indicated above. Because those charges were dismissed without a decision by the Board itself it could be argued that there has not been a "clear determination" by the Board in this case. Therefore it could be argued that, in the absence of "compelling precedent applied to essentially undisputed facts", the Wisconsin Employment Relations Commission is without power to act in this case.

The Examiner is satisfied that the Board decision combined with the Supreme Court decision in the *Insurance Agents*[15]

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[14] *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 77 LRRM 2051 (1971). The Court made a further delineation of the exceptions to the *Garmon* test and added the following examples:

(1) Where the concurrent jurisdiction of the state courts is allowed to help enforce the duty of fair representation as set out in *Vaca v. Sipes*, 386 U.S. 171, 64 LRRM 2369 (1957); and

(2) Where Congress had indicated an intent to allow concurrent jurisdiction such as is the case in court actions under Section 301 of the Labor-Management Relations Act.

Neither these exceptions nor the two referred to in *Garmon* and set out above in footnote 12 would appear to apply to the instant proceeding. If Wisconsin has jurisdiction in this case it is because the *Garmon* test has been met and not because this case constitutes an exception to that test.

[15] *NLRB v. Insurance Agents International Union*, 119 NLRB 768, 41 LRRM 1176, rev'd. 260 F. 2d 736, 43 LRRM 2003 aff'd. 361 U.S. 477, 45 LRRM 2704 (1960). Although the Regional Director's refusal to issue a complaint on the charges filed by the Complainant before the National Labor Relations Board is not the

case amounts to a holding that a concerted refusal to work overtime is neither a protected activity under Section 7 nor a prohibited activity under Section 8 of the Labor-Management Relations Act and that that case constitutes a compelling precedent. It may also be said that the facts are essentially undisputed in this case since the Respondents do not deny that there was a concerted refusal to work overtime.[16]

It has been persuasively argued by Archibald Cox, an acknowledged authority in the field of labor law, that the *Garmon* test is inadequate in that it tends to allow the states too great leeway to regulate the use of economic weapons by the parties thereby disturbing the relative balance of power established by the federal scheme.[17] In this case the Respondents' power to engage in a concerted refusal to work overtime is an economic weapon unregulated by the federal law just as an employer's power to discipline employes for engaging in such activities is unregulated by the federal law. It cannot be denied that to the extent that the states are free to limit or prohibit the use of a particular economic weapon, state laws may have an impact on the relative balance of power in a given bargaining relationship. However the Examiner feels compelled to find in this case that the state of Wisconsin is not, under the *Garmon* test, preempted from effectuating its public policy which *inter alia* prohibits the use of the particular economic weapon employed in this case, that is interfering with production through a concerted refusal to work overtime.

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equivalent of a "clear determination" that the activity is neither protected nor prohibited it is important to note that the National Labor Relations Board relied on the *Insurance Agents* case in finding no prohibited activity and dismissing the charges.

[16] This is not a case where there is a serious question of fact as to whether the activity in question is an unannounced strike. Cf. *1st National Bank of Omaha v. NLRB*, 413 F. 2d 921, 71 LRRM 3019 (1969).

[17] Cox, *Labor Law Preemption Revisited*, 85 Harvard Law Review 1337 (1972).

Violation Found

The Examiner has been unable to find any prior Commission case specifically involving an effort to interfere with production through a concerted refusal to work overtime. However, the language of Section 111.06(2)(h) is quite broad and would appear to encompass any form of concerted action to interfere with production other than through the use of the traditional strike weapon. In the *Stolper*[18] case theCommission held that a concerted refusal to work at a rate in excess of 100% of the established, acceptable production standard was an unlawful interference under Section 111.06(2)(h) even though the employes were free individually to so limit their production. In a series of *Dry Cleaning Cases*,[19] the Commission held that enforcement of union bylaws prohibiting production in excess of union-established production standards constituted an unlawful interference with production.

It can hardly be argued that the activity involved herein is a form of protected concerted activity under Section 111.04 of the Wisconsin Peace Act in view of the similarity between that section and Section 7 of the National Labor Relations Act and the specific prohibition contained in Section 111.06(2)(h) of the Wisconsin Employment Peace Act. The fact that employes are free to engage in the conduct in question individually would not seem to affect the result. The employes in the *Stolper* case were individually free to limit their production to 100% of standard for whatever personal reasons they might have or for no reason. But when the employes in that case engaged in a *concerted* refusal to produce in excess of the established, acceptable standard in an effort to interfere with production they

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[18] *Supra*, note 4.

[19] *Ace Cleaners* (2723), 2/51; *American Dry Cleaners, et al.* (2724), 2/51; *Artistic Dye Works, et al.* (2732), 2/51; and *Bell View Dye Works* (2734), 2/51.

engaged in an unlawful activity. Section 111.06(2)(h) makes no distinction between concerted activities which are otherwise permissible and those which are otherwise impermissible but prohibits *all* concerted activities which attempt to interfere with production other than the strike.[20]

The evidence of record is clear that the refusal rate of overtime offer increased from 5% to nearly 100% immediately after the Respondent Lodge passed the two resolutions which in effect said that no member of the Respondent Lodge would accept an overtime assignment. (Because the Complainant never implemented its proposed change in the work week, the two resolutions had the same practical effect). The inference that the increase in the refusal rate was the direct result of the two resolutions is inescapable because of the timing, the frequent reference to the resolutions by the representatives of the Respondent Lodge and the total absence of any evidence that would support a different conclusion.

On the other hand there is no indication that the Respondent District in any way authorized, encouraged or condoned the action of the Respondent Lodge. Although a Business Representative employed by the Respondent District was frequently present during the negotiations there is no showing in the record that he authorized or encouraged the Respondent Lodge in the activity in question. Although it could be argued that the Business Representative personally condoned the activity by his failure to repudiate the tactic, there is no showing in the record that he was acting as a representative of the Respondent District at the time. The labor dispute was between the Complainant and the Respondent Lodge and the only inference supported by the rec-

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[20] Of course, to the extent that Section 111.06(20(h)) might prohibit activities which are arguably protected activities under Section 7 of the National Labor Relations Act as amended, the Wisconsin Employment Relations Commission is preempted from enforcing said provision.

ord would be to conclude that he was acting as a representative of the Respondent Lodge at the time.

For the above and foregoing reasons the Examiner has found that the Respondent Lodge has acted in violation of Section 111.06(2)(h) of the Wisconsin Statutes and entered an order directing the Respondent Lodge to cease and desist the practice and take appropriate remedial action to insure its non-recurrence and dismissing so much of the complaint that aleges that the Respondent District has acted in violation of Section 111.06 (2)(h) or Section 111.06(3) of the Wisconsin Statutes.

Dated at Madison, Wisconsin, this 26th day of February, 1973.

Wisconsin Employment Relations Commission
By George R. Fleischli /s/
George R. Fleischli, Examiner

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article VI

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

National Labor Relations Act, as Amended (61 Stat. 316, 29 U.S.C. § 141, et seq.)

Section 2. "When used in this subchapter

* * * * * * * *

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

* * * * * * * *

Section 7.

"Employees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8(a).

"It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

Section 10.

"(a) The Board is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by * * * law."

* * * * * * * *

Section 13.

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Section 501.

"When used in this act—

* * * * * * * *

(2) The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

Wisconsin Statutes

Sec. 111.06.

(2) "It shall be an unfair labor practice for an employee individually or in concert with others:

* * * * * * * *

(h) To take unauthorized possession of the property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."